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The Commercial Bank of Utah v. Leonard A. Madsen v. Bob Jeppsen : Reply to Petition for Rehearing

Utah Supreme Court

Don V. Tibbs; Attorney for Respondents;

7584

IN THE SUPREME COURT
of the
STATE OF UTAH

THE COMMERCIAL BANK OF UTAH, corporation,

Plaintiff and Appellant,

vs.

LEONARD A. MADSEN and ARDETH MADSEN, his wife, also known as Ardith Madsen,

Defendants and Respondents,

vs.

BOB JEPPSEN,

Purchaser and Co-Respondent.

Case No. 7584

REPORT TO PETITION FOR REHEARING

[illegible] TIBBS,
Manti, Utah,
Attorney for Respondents

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REPLY TO PETITION FOR REHEARING

Comes now Bob Jeppsen, purchaser and Respondent, Leonard A. Madsen and Ardeth Madsen, his wife, Defendants and Co-Respondents and for Reply to Appellant's Petition for Rehearing allege:

1. Respondents deny each and every allegation in said Petition for Rehearing contained, and

FOR FURTHER AND AFFIRMATIVE DEFENSE, these Respondents allege:

2. That the Petition for Rehearing does not state facts sufficient to constitute a valid grounds for a rehearing.

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Attorney for the Respondents
Bob Jeppsen, Leonard A. Madsen,
Ardeth Madsen, his wife.

Address:
Manti, Utah

1. The petition of the plaintiff stating the facts in this case does not actually show a true picture. The record before the court in this action shows that $1950.00 was the indebtedness that this security was held for. This amount of indebtedness was placed on the home because of a business debt which Mr. Madsen owed to the bank from an unprofitable turkey venture. The record before this court will show that one note on the home was paid off, but because of a clause in the contract between these parties this home was subsequently covered by later notes, unknown to the defendant.

The record shows that the evidence concerning the value of the property was disputed. The plaintiff's witness said that it was worth $1400.00 or $1500.00 dollars, also, that the market value is what he could get out of it. (C. H. Beal testimony page 8, line 21.) Mr. Beal is a land broker, but was not, however, at the sale, so apparently he did not want to purchase it. The testimony of the respondents' witnesses was that it was only worth about $500.00. The bidders at the sale were the witnesses of respondent, one witness being Paul M. Smith, who qualified as a real estate expert and bid $500.00. The Trial Court subsequently ruling that the price paid for the property at the sale was not indequate.

The plaintiff would also have the Court believe that the

evidence showed that the Sheriff was to fix the time of sale at a different time than was on the Notice as prepared by the Attorney for the Plaintiff-Appellant. As I understand the evidence this was not necessarily so. The Sheriff thought the Attorney was to change the time if he wanted it changed. (Larsen page 3, lines 4 to 10) (Anderson page 10, line 23 to 30, page 11, line 1 to 9.) I call the court's attention to the fact that neither the respondents nor the public in general had notice of this conversation at all.

Consequently the facts do not show either (1) an inadequacy of sale price, nor (2) that there was any irregularity in the proceedings by the Sheriff. The price of $501.00 was a reasonable price for this property, as the Trial Court so held. The bid of $1950.00 by the plaintiff bank made after sale was over was for the purpose of getting this property at any cost, I assume, because they consider their judgment valueless.

The Sheriff has at all times acted reasonable and his actions are according to the law. Actually what happened is that the Attorney for plaintiff failed to change the time on the notice and the Sheriff sold the property as directed by the notice. He never made any mistake and he was neither morally or legally supposed to notify the plaintiff. The plaintiff-appellant should take notice of the sale the

same as all other bidders.

It is unfortunate there are dissenting opinions in this Court's decision in that they are both allegedly based upon the equities being in the plaintiff-appellant's favor. Actually the plaintiff-appellant through its attorney made a mistake, no one else did, and no one else had knowledge of the mistake. The property was sold in a fair sale at a fair price. The property was purchased by a 3rd party, the respondent Bob Jeppsen, for a reasonable sum. The dissenting opinion says that the debtor is satisfied with this sale which suggests that the debtor may have some undisclosed interest in the sale. It may however be that the debtors, Leonard A. Madsen and Ardeth Madsen, his wife, are satisfied with this sale not for any undisclosed reason but because this family with their four children are still living in this home paying very nominal rent, and with a possibility of redeeming this property for the sum of $501.00 plus interests and costs. If the plaintiff-appellant bank was able to get this property they would have the Madsens removed and there would not be any possibility of a redemption because the price would be rediculously over the value.

It is the opinion of this writer that the cases as cited by the plaintiff-appellant are not of value considering the facts in this case. The respondents have submitted their

brief and their authorities, and the Court in it's decision has shown that considerable research has been done in citing the said authorities.

2. For its further and separate affirmative defense, the respondents state, that the petition for Rehearing and the brief in support thereof wholly fail to show that some question decisive in the case and duly submitted by counsel has been overlooked, or that the court has based the decision on a wrong principal of Law. In other words, it does not appear that the judgement was erroneous or that the Court made a mistake of law, or had a misunderstanding of the facts. But on the contrary, it is a mere re-statement of the contentions made in the argument of the case before this Court heretofore, and contained in the Brief of appellant's counsel prior to the submission of the case for argument to this court.

The general rules are:

In 4 Corpus Juris, page 632, paragraph 2498, it is said:

> "A rehearing will be granted if the Court has overlooked material points or decisive authorities duly submitted by counsel, (Note 7, citing among others, Utah cases,) or has failed to consider a statute controlling the case, (Note 8) which would have required a different judgement from that rendered. (Note 9) But a petition for a rehearing, suggesting nothing that has not been fully considered by the court in rendering its decision, (Note 10) or which suggests merely immaterial questions as having been

overlooked (Note 11) will be denied."

In 4 C. J. page 635, paragraph 2507, it is said:

"In stating the facts the petition should not proceed to give further reasons in support of the case made in the original brief, and an application which is in form a mere argument or brief cannot be considered by the court. (Note 33, citing many cases.) However, while the power to rehear appeals is comparatively seldom exercised, the Appellate Courts in most jurisdictions undoubtedly have power to grant rehearings and will do so under proper circumstances. (Note 2, citing many cases. Among them the case of Cummings vs. Nielson, 42 Utah 157, 129 Pac. 619, in which case Judge Frick, on page 624, under syllabus 11, discusses the question of applications for rehearing.)"

He says:

"We desire to add a word in conclusion respecting the numerous applications for rehearing in this court. To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearing in proper cases. When this court, however, has considered and decided all if the material questions involved in a case, arehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principal of law, or have either mis-

applied or overlooked something which materially affects the result. In this case nothing was done or attempted by counsel, except to reargue the very propositions we had fully considered and decided. If we should write opinions on all the petitions for rehearings filed, we would have to devote a very large portion of our time in answering counsel's contentions a second time, and if we should grant rehearings because they are demanded, we should do nothing else save to write and re-write opinions in a few cases. Let it again be said that it is conceded, as a matter of course, that we cannot convince losing counsel that their contentions should not prevail, but in making this concession let it also be remembered that we, and not counsel, must ultimately assume all responsibility with respect to whether our conclusions are sound or unsound. Our endeavor is to determine all cases correctly upon the law and the facts, and, if we fail in this, it is because we are incapable of arriving at just conclusions. As a general rule, therefore, merely to reargue the grounds originally presented can be of little, if any, aid to us."

In 4 C. J. page 641, paragraph 2527, it is said:

"A petition or application for rehearing may be dismissed or stricken from the files for cause shown. (Note 96, citing among other cases the case of the Peabody Coal Co. vs. Northwestern El. R. Co., 230 Ill. 214, 82 NE 573, which involved an application for

a rehearing such as we have in the case at bar, to-wit: an applicaiton presenting points already covered.)"

GROUNDS FOR REHEARING. General Rule.

In 3 American Jurisprudence, title Appeal and Error, page 346, paragraph 798, it is said:

"The gneeral rule is that a rehearing will not be granted unless it is shown either that some question decisive of the case and duly submitted by counsel, has been overlooked, (Note 18, citing authorities.) or that the Court has based the decision on a wrong principle of law." (Note 19, citing cases, among them Furnstermaker vs. Tribune Publishing Company, 12 Utah, 439: 43 Pac. 112.)"

Respectfully submitted,

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Address:
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